No. 88-576

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term

BETTY J. ARCHIE, et al.,

Petitioners

vs.

CITY OF RACINE, RONALD W. CHIAPETE, and GEORGE GIESE,

Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

1. There is no conflict among the Circuit Courts of Appeal with respect to the criteria necessary in establishing the existence of a "special relationship". All circuits concur that some type of actual control is necessary.

2. The majority en banc decision from the Seventh Circuit concedes 1983 liability in cases of intentional harm or reckless conduct where a "special relationship" exists.

3. The majority en banc decision of the Seventh Circuit recognized decisions of the Supreme Court and included those decisions in the reasoning behind its decision.

4. This case does not lend itself to an "equal protection" analysis since there is no legislative act involved. Racial motivation has been eliminated by all judges who reviewed this case.

RESPONDENTS' STATEMENT OF THE CASE

A review of Petitioners' statement of the case shows that they have skewed the facts so as to show them in the light most favorable to their position.

The correct facts are generally stated in better detail in the decisions which form the appendix to Petitioners' Petition. Respondents, however, wish to point out the following salient points which highlight omissions from Petitioners' statement of the case which Respondents feel are important to an understanding of the case:

1. Les Hiles (who is White, contrary to Judge Posner's Statement, P.Ap. 25) telephoned the Racine Fire Department from Rena DeLacy's home in the early morning hours of May 27, 1984, and it is also he who first offered the diagnosis "hyperventilating" to the dispatcher. It was this proffered diagnosis that led to the "paper bag" remedy. (P. Ap. 73-74.)

2. The calls from Mr. Hiles were,

at best, unusual and somewhat confusing. In fact, Mr. Hiles states in the first call, "I am Les Hiles you know and I could be the best act in the world. . ." Mr. Hiles was at the time well known in the Racine community as a ne'er-do-well and a drunk. This was known to the dispatcher. (P. Ap. 74 and 81.)

3. Ms. DeLacy (who is Black) spoke to the dispatcher at his request and reaffirmed her problem as hyperventilation although she described it as hyperthermia; she indicated she had the problem before; and most importantly did not ask personally for rescue squad service. (P. Ap. 74-75.) Les Hiles' testimony at trial indicated that she didn't want this service. (P. Ap. 7, footnote.)

4. Petitioners make the blatently incorrect statement that the dispatcher directed her to remain at her apartment. This is not supported in the record. Ms. DeLacy asked, "And stay in my own

apartment?" This was never suggested by the dispatcher nor did he comment on her question. (P. Ap. 74-75.)

5. The "paper bag" remedy is an accepted first aid practice in cases of hyperventilation. (P. Ap. 81.)

The Respondents believe that the above itemized facts are important in judging the "totality of circumstances" which Petitioners advance as a necessary consideration in this case.

ARGUMENT

The Respondents' request of the Supreme Court that the Petition for Writ of Certiorari be denied for the following reasons:

I.

THE CONFLICT AMONG THE CIRCUITS AS ALLEGED BY PETITIONER IS NON-EXISTENT.

In response to Section I of Petitioners' Petition alleging that "there is a direct and irreconcilable split among the United States Court of Appeals. . . ." On this question it is observed that the "split" asserted by Petitioners is considerably overstated. Judge Easterbrook, the author of the en banc decision out of the Seventh Circuit Court of Appeals, reviewed this same question (P. Ap. 18, footnote) and concluded that decisions of the Seventh Circuit had been followed by decisions in the District of Columbia Circuit, the First Circuit, the Second Circuit, the Eighth Circuit, the Ninth

Circuit, and the Eleventh Circuit. The only circuit reaching a dissimilar conclusion in a decision has been the Third Circuit in a 1985 case which interestingly enough is the oldest decision cited by Judge Easterbrook in that footnote. Estate of Bailey v.York, 768 F. 2d 503, CA3 (1985).

A review of Bailey, supra, reveals that it was a split panel decision with the dissenting judge disagreeing on the very point which relates to this discussion; to wit: the concept of "special relationship." Also that case did involve state custody of a child who subsequently suffered fatal injuries. The case was decided on unique facts with the majority saying (p. 511):

> We find it sufficient to hold that in the special circumstances pleaded here, this case falls on the other side of the line suggested in Martinez. (Emphasis added.)

Respondents' research indicates that no circuit has found a "special relationship" in the absence of actual control

of an injured party by a state actor; i.e., putting a person in danger. Actual control need not involve legal custody. In this case the dispatcher, George Giese, never exercised actual control over Rena DeLacy.

From the standpoint of the criteria for the establishment of a "special relationship", therefore, there is no conflict among the circuits.

II.

THE SEVENTH CIRCUIT MAJORITY DECISION DOES NOT PRECLUDE LIABILITY IN RESCUE OR PROTECTION SITUATIONS.

On page 14 of their Petition, Petitioners make the erroneous statement that:

> In this case, the majority opinion effectively holds and concludes, irrespective of how the power is abused, § 1983 liability will not attach in any rescue or protection context. (Emphasis added.)

This is simply not true. The majority opinion makes it clear that such liability will attach in cases involving intentional harm,

reckless conduct which is tantamount to intent, and where a special relationship is created between the state actor and the injured party. This latter situation is summed up by the majority when it states:

> When the state puts a person in danger, the Due Process Clause requires the state to protect him to the extent of ameliorating the incremental risk. When a state cuts off process of private aid, it must provide replacement protection. (P. Ap. 22.)

The majority decision properly excluded negligence, whether ordinary or gross, as a basis for liability under § 1983. (P. Ap. 15.) These conclusions of the majority are in all respects consistent with generally accepted principles governing claims brought under § 1983.

III.

THE DECISION OF THE EN BANC MAJORITY IN THE SEVENTH CIRCUIT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

Apparently one of the grounds advanced by Petitioners in urging the Court to grant a writ in this matter is that the

en banc decision from the Seventh Circuit conflicts with an applicable decision of this court. They specifically mention Whitley v. Albers, 475 U.S. 312 (1986).

Respondents' review of this case indicates that Petitioners' reliance on it is misplaced. First of all, that case centered about a violation of the Eighth Amendment to the Constitution which is not involved in the present petition. Secondly, the majority in the en banc decision from the Seventh Circuit was cognizant of Whitley and cited it in making the analysis with respect to reckless conduct being equivalent to intentional conduct. (En banc decision, Slip Op., page 13, omitted from Petitioners' Appendix, attached hereto as Respondents' Appendix 1.)

Again Petitioners have misstated the facts of this case by indicating that Respondent Giese acquired custody of Ms. DeLacy and rendered unsolicited "facile" medical advice and directing her to remain

in her home. They also state that he affirmatively discouraged her from seeking private aid. None of this is true as indicated previously by Respondents in their corrections to Petitioners' statement of the case.

Petitioners have no grounds, therefore, to assert that the majority in the Seventh Circuit rendered a decision which is in conflict with an applicable decision of this court.

IV.

AN "EQUAL PROTECTION" REVIEW IS NOT NECESSARY IN THIS CASE.

With respect to race being a motivating factor for the dispatcher's failure to send the rescue squad, none of the 13 judges who have so far reviewed this fact situation have concluded that race played a part in the dispatcher's decision. While Judge Posner, in his concurring opinion in the Seventh Circuit, speculated that race may have been a factor, he did so from an erroneous conclusion that Les Hiles was Black.

In addition, the dispatcher testified that race was not involved in his failing to send the rescue vehicle and it was clear at trial that the Racine Fire Department has sent such vehicles to the assistance of thousands of minority persons. Also, the dispatcher did state reasons for his failure to send a rescue squad when he stated:

> On the day that Mr. Hiles called, I believe that I didn't send the rescue squad is because he was the caller. And I believe that just from reputation I knew he is the type of a nuisance that it was more than likely a needless type call, and I believe that's why the rescue squad wasn't sent. (P. App. 80.)

While the trial judge found this reason to be absurd and the result of stupidity or poor judgment, nevertheless a reason was stated.

It is interesting to note that a single Supreme Court case relied on in Petitioner's equal protection argument is

Logan v. Zimmerman Brush Co., 455 U.S. 422, 71 L. Ed. 2d 265 (1982). Respondent's reading of this case indicates that it was decided on the basis of the Due Process Clause of the Fourteenth Amendment and not the Equal Protection Clause. In a separate opinion four justices discussed the Equal Protection Clause and make the following statement:

> For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the Equal Protection Clause's guarantees. At the minimum level, however, the Court 'consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.'"

It seems, therefore, that equal protection privileges are directed toward legislative acts rather than the acts of individual state agents. (See Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 60 L. Ed. 2d 870, (1979).)

There is no legislative act involved in the present case and Respondents take the position that further analysis of equal protection aspects is unwarranted.

CONCLUSION

Petitioner has not stated grounds under Rule 17 of the Rules of the Supreme Court to warrant the granting of a Writ of Certiorari in this case, nor have they stated any special and important reasons which would justify such a Writ.

The alternative request by Petitioners to remand the matter to the Seventh Circuit pending the decision of DeShaney v. Winnebago County (Supreme Court Case No. 87-154, 1987) is also not warranted. It is Respondents' position that a decision in DeShaney favorable to the Petitioners in that case would not necessarily be instructive in the present case because there are great dissimilarities in the facts centering mainly about the custody/control question.

For the reasons stated in this brief, Respondents respectfully urge the Court that it deny Petitioners' Petition for a Writ of Certiorari in this matter.

Dated: October 27, 1988

Respectfully submitted,

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A P P E N D I X

holding in *Davidson* and *Daniels* that the Due Process Clause does not forbid negligent deprivations, the Court recognized that the Constitution forbids deliberate, unauthorized deprivations. Giese did not slay DeLacy, but his inaction coupled with bad advice was a step on the path to her death—enough so that a court might award damages in tort. The advice to breathe into a paper bag might have led DeLacy to think that she did not need further aid (though there was no testimony to that effect). Combining the rule against the deliberate deprivation of life with the tort law's view of causation, the plaintiffs could have a case for liability. With one more step: a weakening of the intent rule. Giese did not want DeLacy dead, so his conduct was not intentional the way that word is used in constitutional law. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

The Court sometimes treats the reckless infliction of injury as equivalent to intentional infliction. See *Whitley v. Albers*, 475 U.S. 312, 319-21 (1986) (Cruel and Unusual Punishments clause); cf. *Daniels*, 474 U.S. at 334 n.3 (reserving the question whether either recklessness or gross negligence would be enough to make out a due process claim). The equation of reckless with deliberate conduct is familiar, on the ground that reckless disregard of a great risk is a form of knowledge or intent. E.g., *Sunstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1039-40 (7th Cir. 1977) (securities laws); Model Penal Code §210.2(1)(b) (1980) (treating reckless homicide as murder). We assume that the Supreme Court would hold that recklessly causing the death of another deprives that person of life without due process of law.

An act is reckless in the pertinent sense when it reflects complete indifference to risk—when the actor does not care whether the other person lives or dies, despite knowing that there is a significant risk of death. See Model Penal Code 21 (defining recklessness as "conscious disregard of [a] risk . . . [that] manifests extreme indifference to the value of human life." See also *Whitley*, 475 U.S. at 321, adopting this court's definition in *Duckworth v.*